IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8671 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

RAKESH @ BABLU HARISHANKAR SHUKLA

Versus

STATE OF GUJARAT

Appearance:

MR RK MISHRA for Petitioner

MR UR BHATT ADDL.GOVERNMENT PLEADER

for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 20/03/98

ORAL JUDGEMENT

The Commissioner of Police for the City of Ahmedabad on 21/11/1997 passed the order of detention invoking his powers under Sec.3 of the Gujrat Anti-Social Activities Act (for short the 'Act"), pursuant to which the petitioner came to be arrested and at present, is under detention. He, by this application under Art.226 of the Constitution of India, calls in question the

legality and validity of that order.

2. Necessary facts, in short, be stated. A complaint of the offence punishable under Sec.25(1)(b)(a) and 29 (a)(b) under the Arms Act came to be lodged with Bapunagar Police Station alleging that the petitioner was found in possession of one revolver, the value of which is assessed at Rs.5,000/- alongwith 15 cartridges. Another complaint also came to be lodged for the likewise offence with Odhav Police Station. After careful study of the papers thereof, the Police Commissioner found that the petitioner was illegally dealing in fire arms and the weapons, and was terrorising the people in Odhav area by using his one or another weapon. He used to ask the residents of that area to help him by providing their premises for keeping his arms and ammunition and those who refused to help him were brutally beaten. When people assembled to help the victim, he used to run amok and cause the people to scare. He was considered to be the evil and people were feeling insecured, because of fear of violence at any time and of even a worst form. The Police Commissioner, after inquisition, knew that no one was willing to lodge the complaint against the petitioner or make the statement against the petitioner and it was, because of fear of violence and feelings of insecurity. After great persuation and that too after assurances, that the particulars disclosing their idendity will be kept secret some of the persons came forward to make the statement against the petitioner.A stern action against the petitioner was therefore necessary so as to make the people feel free and prevent the public order being disrupted. Regarding action to be taken in law, different measures were thought of by the Police Commissioner but he could see that any action under general law would nothing but a futile exercise, as it would yield no result, because general law was found falling short. After cogitation, the Police Commissioner was of the firm view that the detention order under the Act was the only way out. In the result, he passed the order of detention, pursuant to which the petitioner has been arrested and is at present kept under detention.

3. The petitioner has challenged the order of detention on several grounds but at the time of submission before me, the learned advocate representing the petitioner tapered off his submission confining to the only ground namely exercise of privilege by the detaining authority under Sec.9(2) of the Act. According to him, there was no just cause to withhold the particulars about the witnesses. As the particulars about the witnesses were not supplied,the right of the

petitioner to make effective representation was impaired, and therefore, continued detention of the petitioner is bad in law. In reply to such submission, the learned APP Mr. Bhatt representing the other side, has submitted that necessary materials, the copies of which are supplied to the petitioner, were considered by the Police Commissioner himself and after cogitation, he reached the conclusion that to protect the lives of the witnesses and not to give any scope to the detenu, to satisfy his ill-will suppression of those particulars was absolute necessary. The privilege was therefore exercised in public interest. In fact, there is no cause to find fault with the same, with all bonafides, the privilege was exercised. When both have confined to the only point qua exercise of the privilege, I will deal with the same, going to the root of the case and would not dwell upon other grounds.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating nondisclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars

of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujrat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the detaining authority has to explain to the satisfaction of the court by filing the affidavit that having regard to the facts and circumstances of the case, it was absolutely necessary for him to exercise the privilege, viz. not to disclose the particulars about the witnesses. If the affidavit is not filed or filling the affidavit appealing explanation is not given, the court is entitled to infer against the detaining authority. It is pertinent to note that in this case, no affidavit is filed by the detaining authority explaining the circumstances under which he found it expedient to withhold the particulars about the witnesses. When filing the affidavit, no explanation is offered, it should be assumed that without any just cause, the privilege is exercised and without applying

the mind, the detaining authority took the decision not to supply the particulars about the witnesses. In the result, the subjective satisfaction is vitiated. Under the circumstances, the petitioner ought to have been furnished with necessary particulars. As he did not get those particulars, his right to make effective representation is certainly impaired. Consequently, the order passed cannot be maintained in law and continued detention must be held to be unconstitutional and illegal.

7. For the aforesaid reasons, this petition is allowed. The order of detention passed on 26th September, 1997 by the Police Commissioner, Ahmedabad City, is hereby quashed and set aside. The petitioner-detenu is ordered to be set at liberty forth with, if not required in any other case. Rule accordingly made absolute.

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